SUPREME COURT, U.S.
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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GEORGE W. STRAKE, JR.,
Appellant,

v.

A. M. SEAMON, ET AL.,
Appellees.

On Appeal From The United States District Court For The Eastern District Of Texas

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

I. Whether state enacted congressional districts that divide a minority community in Dallas County, Texas into two districts so that minority individuals are a minority of each district's population, rather than putting all of that community in one district in which minority individuals would be a substantial majority of the district's population, is discrimination proscribed by the Voting Rights Act and the Fourteenth and Fifteenth Amendments to the Constitution.

II. Whether so dividing that minority community, rather than putting it in one district, in order to divide Republican voters and keep them from constituting a majority of the voters in the other district, is a "partisan political gerrymander" in violation of the Fourteenth Amendment to the Constitution.

PARTIES

Appellant, George W. Strake, Jr., as State Chairman of the Republican Party of Texas, was plaintiff in the case below. Strake was substituted for the prior Chairman, Chester R. Upham, Jr., who was a defendant, and was realigned as a plaintiff. Also aligned as plaintiffs were the Dallas Branch, National Association for the Advancement of Colored People, Inc., and its president, Theodore Watkins, on behalf of themselves, their members and all individuals similarly situated, and Felix Wilson on behalf of himself and all individuals similarly situated; plaintiff-intervenors Matt Garcia, Albert G. Luna, Arnold Gonzales, Bernardo Eureste, Ricardo Padilla, Rudy Palomo, Mary Tamez, Roy Cristan, and Hector DeHoyos; and plaintiff-intervenors Antonio Garcia, III, Jesus Rodriquez, Bertha Gonzales, Apolonia Dolorosa, and Juanita Adame.

A defendant in the case below was A. M. Seamon. He was a plaintiff but was realigned as a defendant. Also aligned as defendants in the case below were plaintiff-intervenors Juanita Craft, Beverly Alice DeBase, Juan Gonzales, Charles F. Timms, E. Ricardo Medrano, and Michelle Bobadilla. The other defendants were the State of Texas; Mark White, Governor of the State of Texas; John Fainter, Secretary of State of the State of Texas; and Bob Slagel, State Chairman of the Democratic Party of Texas.

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On Appeal From The United States District Court For The Eastern District Of Texas

JURISDICTIONAL STATEMENT

Appellant George W. Strake, Jr., respectfully prays that this Court note probable jurisdiction of this case and reverse the judgment of the United States District Court for the Eastern District of Texas entered on February 13, 1984 and the opinion of that Court dated January 30, 1984 on which the judgment was based, and render judgment that the congressional districts in Dallas County enacted by the Texas Legislature in 1983 in Senate Bill 480, are invalid.

OPINIONS BELOW

The district court opinions, majority and dissent, issued January 30, 1984 are unreported and are reprinted as Appendix A (hereafter referred to as "App."). The judgment of the district court entered on February 13, 1984 is unreported and is reprinted as Appendix B. The order of the district court of March 15, 1984 denying appellant's motion for a rehearing or new trial is unreported and is reprinted as Appendix C.

JURISDICTION

This is a direct appeal from an order of a three-judge district court which was convened pursuant to 28 U.S.C. § 2284 to hear an action challenging the constitutionality of a portion of a congressional district plan for the State of Texas and seeking an injunction against the use of those challenged districts in congressional elections. On February 13, 1984, the three-judge district court entered a judgment holding that the challenged districts were valid. App. B. Appellant filed a motion for rehearing or new trial on February 23, 1984 requesting the district court to reconsider its decision. Appellant's motion for rehearing or new trial is reprinted as Appendix D. On March 15, 1984, the district court entered an order denying appellant's motion for rehearing or new trial. App. C. Appellant filed a notice of appeal in the district court on April 10, 1984 appealing that portion of the district court judgment pertaining to congressional districts in Dallas County and appealing from the district court order denying appellant's motion for rehearing or new trial. The notice of appeal is reprinted as Appendix E. This Court has jurisdiction of this direct appeal under 28 U.S.C. § 1253 and 42 U.S.C. § 1973(c).

STATUTES INVOLVED

The constitutional provisions and statutes involved in this case are the Fourteenth and Fifteenth Amendments to the Constitution of the United States and Section 2 of the Voting Rights Act of 1965, as amended in 1982.

Section 1 of the Fourteenth Amendment provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 1 of the Fifteenth Amendment provides:

> "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

Section 2 of the Voting Rights Act provides:

> "(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b (f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circum-

stances, it is shown that the political proceeses leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973.

STATEMENT OF THE CASE

This is a direct appeal from an order of the three-judge United States District Court for the Eastern District of Texas holding that congressional districts in Dallas County, Texas under a plan enacted by the Texas Legislature in 1983 are constitutionally and statutorily valid.

This is the second time since the 1980 census and apportionment that the dispute over congressional districts in Dallas County, Texas has reached this court.

As a result of the 1980 census, Texas was apportioned three additional seats in the United States House of Representatives. In 1981, the Texas Legislature enacted Senate Bill No. 1 (S.B. 1) which divided the State's population into twenty-seven congressional districts.

Defendant Seamon and other individuals filed suit in the U.S. District Court for the Eastern District of Texas challenging sixteen of the twenty-seven congressional

districts created by S.B. 1 on the grounds that they diminished minority voting rights in violation of the Fourteenth and Fifteenth Amendments to the Constitution. The three-judge district court postponed decision until after S.B. 1 had been cleared or not by the United States Attorney General under Section 5 of the Voting Rights Act.

On January 29, 1982, the Attorney General objected to only two of Texas' congressional districts in the Rio Grande Valley of South Texas.

The district court held that the Attorney General's objection to the two districts rendered S.B. 1 entirely void and on February 27, 1982 it adopted an interim plan for all twenty-seven districts which corrected the problem which had been the basis of the Attorney General's objection to the two South Texas districts and implemented the same districts as were in S.B. 1 for the rest of the State, except for Dallas County.[1] Even though the district court did not find the congressional districts in Dallas County constitutionally or statutorily invalid, it redrew two of those districts (districts 5 and 24) in a manner very different from what they were under S.B. 1. *Seamon v. Upham*, 536 F.Supp. 931 (E.D. Tex. 1982).

Under S.B. 1, the minority community in South Dallas was put in district 24 so that minority individuals constituted 63.8% of that district's total population. Under the district court's plan, that minority community was divided between districts 5 and 24 so that minority in-

1. Three congressional districts, 3, 5, and 24, comprise virtually all of Dallas County (a small part of district 26 is in Dallas but has very few Dallas County residents within it).

dividuals were a minority of the population in each district (31.87% in the 5th district, and 45.7% in the 24th).

On appeal, this Court vacated the district court judgment, holding that in the absence of a finding that the legislatively enacted districts in S.B. 1 offended the Constitution or the Voting Rights Act the district court should have used those districts in its interim plan, rather than imposing different districts of its own design. *Upham v. Seamon,* 102 S.Ct. 1518 (1982). Congressional primary elections were only a month away so this Court remanded the case to the district court for it to determine whether there was sufficient time to modify its judgment and correct the Dallas County districts, or to allow the elections to proceed on schedule using the erroneous districts.

On remand, the district court decided not to correct the Dallas districts and ordered that the 1982 congressional elections be held under its plan.

Relief from this decision of the district court was requested of this Court in a petition for rehearing, however no relief was granted.

Congressional elections in Dallas County were held in 1982 using the erroneously enacted districts of the district court plan.

In May 1983, the Texas Legislature enacted Senate Bill 480 (S.B. 480) which divided the State into twenty-seven congressional districts. Under S.B. 480, districts 5 and 24 in Dallas County were substantially the same as the districts erroneously implemented by the district court in 1982. The minority community in South Dallas was not put in district 24 as it had been under S.B. 1, but is divided between districts 5 and 24 so that the

minority population in district 5 is 31.86% of the total, and in district 24 is 44.84% of the total.[2]

The United States Attorney General posed no objection to S.B. 480 under Section 5 of the Voting Rights Act.

The district court had retained jurisdiction over Texas' congressional districts, so George W. Strake, Jr., as Chairman of the Republican Party of Texas, filed amended pleadings challenging the validity of districts 5 and 24 under S.B. 480. Strake had succeeded Chester R. Upham, Jr. as Chairman of the Republican Party of Texas, who had been a defendant and had supported S.B. 1 districts for Dallas County in the prior trial and appeal.

The Dallas Branch of the National Association for the Advancement of Colored People, Inc., its president and one of its board members, individually and on behalf of themselves and all individuals similarly situated, intervened in the case, also challenging the validity of districts 5 and 24 in Dallas County.

Appellant and the NAACP contended that dividing the minority community in South Dallas between districts 5 and 24 so that minority individuals in those districts are a minority of the population in each, rather than putting that community all in district 24 so that minority indi-

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2. The Trinity River, which passes through the minority community, is used by S.B. 480 as the boundary between districts 5 and 24. Prior to S.B. 1, the Trinity was the boundary of these districts which were court implemented in 1973 in *White v. Weiser*, 412 U.S. 783 (1973). *White v. Weiser*, however, was argued and decided solely on the basis of population differences among districts in the state; there was no claim whatsoever regarding minority voting rights and it was not even considered by the Court. The Trinity River is no barrier to putting this South Dallas community into one congressional district. Other Dallas election districts—state legislature, school board, city council, justice of the peace—ignore the Trinity and encompass parts of this community from both sides of the river.

viduals would constitute a substantial majority of the population in that district, was a denial of the voting rights of members of that minority community in violation of Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments to the Constitution.

After an evidentiary hearing before the three-judge district court on November 30, 1983, a two-judge majority rendered an opinion, and subsequently a judgment, upholding districts 5 and 24 under S.B. 480.

The majority judges felt that under S.B. 480, minority voters in the 5th and 24th have "influence" in congressional elections in each of those districts so that it was not illegal discrimination not to put them all in the 24th where they would have a controlling voice. The dissenting judge, Judge Steger, concluded that such a division of the minority population between the two districts violated the Voting Rights Act. Judge Steger found that in dividing the minority population between districts 5 and 24, Republican voters' rights were diluted by dividing them between 5 and 24. Judge Steger noted that this was done by a Democratic-controlled legislature for the purpose of maintaing Democratic congressmen. He concluded that districts 5 and 24 under S.B. 480 constituted an unconstitutional political gerrymander of Republican voters.

Appellant filed a motion for rehearing or new trial on February 23, 1984 asking the majority judges to reconsider their decision in light of Judge Steger's finding of unconstitutional political gerrymandering. On March 15, 1984, the same two judges who rendered the majority opinion denied appellant's motion for rehearing or new trial. Judge Steger dissented from this denial.

THE QUESTIONS ARE SUBSTANTIAL

This case involves the dilution of the voting rights of minority citizens in order to suppress the opposing political party. If this misuse is allowed to stand, the rights of minority voters would become an expendable pawn in the hands of the dominant political party in a state to be used as necessary to ensure the suppression of the opposing party.

The congressional district plan for Dallas County, S.B. 480, was motivated by the Texas Democratic Party's desire and intention to maintain incumbent Democratic congressmen.[3] The Democratic-controlled Texas Legislature accomplished this by having S.B. 480 divide the south Dallas minority community between districts 5 and 24. This allowed them to divide Republican voters in the area between 5 and 24. Since the minority voters in Dallas vote 90-95% for Democratic candidates over Republican candidates, no matter what, App. A, A-2-5, the Democrats were guaranteed that they would outvote the Republicans in those districts. If the South Dallas minority voters were left in district 24, two things would result. The minority voters in district 24 would have the voting strength to elect a minority individual to represent them rather than the anglo incumbent, if they so chose, and Republicans in district 5 would have the voting strength to elect a Republican over the incumbent Democrat.

In dissenting from the majority of the district court, Judge Steger concluded that S.B. 480's split of the Dallas County minority community into two districts deprived

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3. This was recognized by both the majority and dissenting judges. App. A, A-1-13, A-2-8, 11.

minority citizens of equal access to the political process in violation of Section 2 of the Voting Rights Act, App. A, A-2-10, and also concluded that the division of the minority community minimized the strength of Republicans in districts where they might otherwise have held a majority in violation of the Equal Protection Clause. App. A, A-2-13.

I

The district court majority opinion distills the case to one issue and on that issue holds that the rights of Dallas County minority voters are not diluted by denying them the opportunity to be a substantial majority in one district because by dividing them they have "influence" in two districts. This holding and any inference from other cases that it is permissible to so fragment a minority community must be corrected. To allow the splitting of a minority community so that minority voters have influence in two districts, rather than a controlling voice in one, is to authorize a return to the repressive effect of multi-member districts. Under the guise of "looking after" minorities by benevolently giving them "influence" in several districts, a large minority population can be relegated to a minority of the vote in all districts. Such a result cannot be what minorities and others struggled so long and hard to attain through the Voting Rights Act.

Judge Steger's statement of the law on this point is correct:

> "Despite the position of the majority that this question remains virtually unsettled, this writer cannot help but notice that courts have consistently condemned redistricting plans that sought to frag-

> ment cohesive or centralized minority populations under the guise of giving the minorities 'influential' or 'swing' power in several districts. *Major v. Treen,* Civ. No. 82-1191, Slip Op. (E.D. La. September 23, 1983). *See also White v. Regester,* 412 U.S. 755 (1973); *Nevett v. Sides,* 571 F.2d 209 (5th Cir. 1978); *Kirksey v. Board of Supervisors,* 554 F.2d 139, 149 (5th Cir. 1977); *Robinson v. Commissioner's Court,* 505 F.2d 674 (5th Cir. 1974); *Carstens v. Lamm,* 543 F.Supp. 68 (D. Colo. 1982). These courts have consistently recognized that fragmentation invariably results in a minimization of minority voting power and political access. Yet, as will be seen, the fragmentation of the Dallas County minority community wrought by S.B. 480 is sought to be justified by an argument that it gives them increased political strength". App. A, A-2-3, 4.

The gist of the argument is that the minority community has sufficient political strength because its vote can "swing" an election to whichever candidate it chooses. This ignores the enormous difference between the ability to nominate and elect a candidate truly of one's choice and the ability only to choose between two candidates who are the choice of the anglo majority in each district.

Divided into two districts as under S.B. 480, the true choice of the minority community can never win if the anglo majority opposes him. One of the NAACP witnesses at trial likened it to fighting Larry Holmes, the heavyweight champion—you know you can't win so you don't even get into the ring. As Judge Steger observed, "Many worthy and promising minority citizens of Dallas County may believe there is no hope of success in a district controlled by white majorities at both the primary and general election stages and choose not to seek political

office or choose to not even become involved in the political process in Dallas County. This degree of political nonparticipation, while not expected in Dallas County, is certainly possible when a compact, contiguous and highly concentrated minority community is divided into two separate voting units." App. A, A-2-7.

Unlike general elections when the Democratic candidate gets the minority vote, no matter what, minority voters in the Democratic primary can, and do, shift their vote from one Democrat to another. This ability to shift can provide minority voters some impact, but only if the anglo voters in the Democratic primary are fairly evenly divided between candidates. Even in that instance, however, minority voters are only picking between the choices the anglo majority has given them.[4]

In general elections where the minority vote is not subject to being shifted over to the Republican candidate, the degree of "influence" that minority voters may get from automatically voting for the Democratic candidate is problematic.[5] Judge Steger's dissenting opinion has an

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4. There will be times when the minorities' choice is the same as the anglo majority, however, the very purpose of Section 2 of the Voting Rights Act is to provide minority voters an opportunity to elect their choice, even when anglo voters don't agree.

5. One unusual aspect of this case was the fact that the NAACP acknowledged that the present anglo congressmen from the 5th and 24th districts were responsive to minority concerns, however that organization still opposed the use of the districts that elected those congressmen. Responsiveness can be a fleeting thing, especially when the voting power to command responsiveness does not exist. As long as Dallas minorities are split and relegated to a minority of the voting power in each district, they are subservient to the anglo majority and "a slave with a benevolent master is nonetheless a slave". *McMillan v. Escambia County, Florida,* 638 F.2d 1239 (5th Cir. 1981).

excellent discussion and examples of the shallowness of the "influence" accorded minorities in districts 5 and 24 under S.B. 480. App. A, A-2-5, 6, 7.

Rather than having this highly questionable "influence" in two districts that the minorities arguably have under S.B. 480, they would have real political access and an opportunity to elect a candidate truly of their choice as the Voting Rights Act requires if they had been left in one district where they would constitute 65% of the population.[6] In such a district, the minority community would be able to nominate and elect the candidate of its choice regardless of whether anglo voters in Dallas County approved.

Many factors that would tend to prove a violation of Section 2 of the Voting Rights Act have been identified and discussed in the legislative history of the amendment of Section 2 and, in turn, by some courts. *Major v. Treen*, 574 F.Supp. 325 (E.D. La. 1983). To show a violation, one need not prove all or any threshold number of the factors and the failure to prove a factor is not proof that there is no violation. Under Section 2, it must only appear from a totality of the circumstances that minorities have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. Voting Rights Act § 2. Judge Steger found proof of enough factors to show a violation of Section 2:

> "Because of the history of official discrimination in voting rights in Dallas County, the multimember districts that had been used in Dallas County until

6. Under S.B. 1 in 1981, district 24 was, in essence, such a district.

> struck down in *White v. Regester*, 412 U.S. 755 (1973), the effects of past discrimination in such areas as education, employment and health, the fact that Dallas County has never elected a black congressman, and most importantly, because of the existence of racially polarized voting in Dallas County, which I find to have been sufficiently proven by the evidence contained in the record, I believe that Section 2 of the Voting Rights Act would be violated by fragmenting the Dallas County minorities in two congressional districts. On the other hand, a 65% minority population in district 24, as advocated by the Plaintiffs in this case, would assure Dallas County minorities that they would have a real opportunity to equally participate in the selection and election of candidates of their choice." App. A, A-2-8.

The minority community in south Dallas is tired of the dilution of their vote that results from the division of their community into two districts. They want equal access to the political process and an opportunity to elect a congressman who is truly their choice. There never has been a minority congressman from Dallas, even though minorities constitute 28.4% of the population. Houston has elected a minority to Congress continuously since 1973. The Voting Rights Act clearly does not guarantee that minorities must be represented by one of their own, however, it does mean that minority voting rights can not be diluted so as to prevent them from electing a minority if they want. On the final vote in the Texas Legislature on S.B. 480, one of Dallas County's three minority legislators voted in favor and two abstained by voting present. One who abstained stated, "I voted present on S.B. 480 because I cannot, in good conscience, support a reapportionment plan which bifurcates the black community in

such a way as to make it impossible to elect a black in Dallas County for the remainder of this decade."

The detrimental effect on minority voting rights by spreading minorities among several districts is clear and should not be allowed, especially when it is done to suppress the opposing political party.

II

Judge Steger concluded that not only did S.B. 480 violate minority voting rights, it also violated the rights of a cognizable political group, Republican voters in Dallas County, under the Equal Protection Clause:

> "It has long been noted by the Supreme Court that the guarantees of the Equal Protection Clause against invidious discrimination extend to voting rights and political groups as well as economic units, racial communities, and other entities. *Karcher v. Daggett,* 103 S.Ct. at 2669; *Williams v. Rhodes,* 393 U.S. 23, 39, (1968) (Douglas, J., concurring). *See also Gaffney v. Cummings,* 412 U.S. 735 (1973); *Abate v. Mundt,* 403 U.S. 182 (1971). In fact, the Court has consistently recognized 'that "dilution" of the voting strength of cognizable *political* as well as racial groups may be unconstitutional' ". App. A, A-2-10, 11.

In *Karcher v. Daggett,* 103 S.Ct. 2653 (1983), the concurring opinion of Justice Stevens, and dissents of Justice Powell and Justice White, whose dissenting opinion was joined by Chief Justice Burger and Justice Rehnquist, all expressed serious concern about opening the door for partisan political gerrymandering by requiring too high a degree of population equality between dis-

tricts. The district court decision in the present case opens the door for partisan political gerrymandering under the guise of spreading minority voters so that they have "influence" in more than one district, rather than a controlling voice in one.

Justice Stevens, in his concurring opinion in *Karcher*, identified three factors relevant to a showing of political gerrymandering. Judge Steger found that the district court record contained proof of a violation of the Equal Protection Clause. Dallas County has, over time, become increasingly more Republican, to the point that in the last several primaries, as many people have voted in the Republican primary as in the Democratic primary, and in the 1982 general elections in all partisan races in Dallas County, Republican candidates got 60% of the vote and Democratic candidates got 40%. In spite of this strength, Republicans are only able to elect one congressman out of the three congressional districts within Dallas County that comprise nearly all of the county's population. And, as has been pointed out, it is unquestionable that the perpetuation of incumbent Democratic congressmen was the primary motivation for the passage of S.B. 480.

S.B. 480 violates the constitutional rights of Republican voters in Dallas County.

The old adage that "two wrongs do not make a right" is especially appropriate. A cohesive minority community must not be fragmented and thereby lose the voting power it otherwise would have. This treatment is especially worthy of condemnation when the rights of Republican voters are diluted as the inescapable and intended result.

The desire of a political party to beat the other party is strong, as it should be, but the ability to suppress the other party must be restrained or that desire will compel the dominant party to resort to any means to succeed. In the present case, the desire to minimize the effect of Republican voting strength was so strong that it compelled the Democratic Party to abuse the voting rights of minority citizens in Dallas.

CONCLUSION

The opinion and judgment of the District Court pertaining to Dallas County congressional districts should be reversed and judgment rendered holding S.B. 480 invalid as to Dallas County either because of the dilution of minority voting rights under the Voting Rights Act and the Fourteenth and Fifteenth Amendments or because of the discrimination against Republican voters under the Equal Protection Clause of the Fourteenth Amendment, or both.

Appellant respectfully requests this Court to note probable jurisdiction of this case and order this case to stand for briefing and argument.

Respectfully submitted,

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APPENDIX A

Appendix A-1

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
PARIS DIVISION

CIVIL ACTION NO. P-81-49-CA

A. M. SEAMON

versus

CHET UPHAM, ET AL

(Filed January 30, 1984)

Before JOHNSON, Circuit Judge, PARKER and STEGER,* District Judges.

JOHNSON, Circuit Judge:

This protracted proceeding commenced in 1982 when an action was filed challenging the Texas Legislature's reapportionment of the state congressional districts. *Seamon v. Upham*, 536 F.Supp. 931 (E.D. Tex. 1982) (*Seamon I*). We need not rehash the prior events in this action, as the case history is set forth at length in *Seamon*

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* Judge William Wayne Justice, Chief Judge, Eastern District of Texas, sat on the original panel designated by Chief Judge Charles Clark, United States Court of Appeals for the Fifth Circuit, on September 11, 1981. Since our decision in *Seamon I*, Judge Justice recused himself and Chief Judge Clark, appointed Judge Steger to fill the vacancy on our panel on August 15, 1983.

I and in the Supreme Court's opinion on appeal from our prior decision. *See Upham v. Seamon,* 102 S.Ct. 1518 (1982). Suffice it to say, that we once again find ourselves deep in the "political thicket" of reapportionment. *See Baker v. Carr,* 82 S.Ct. 691 (1962).

Representatives of the Republican Party for the State of Texas (Republicans) and the Dallas Branch of the National Association for the Advancement of Colored People (NAACP) join as plaintiffs in the case *sub judice* and contend that the Texas Legislature's redistricting of Dallas County (S.B. 480) violates section 2 of the Voting Rights Act, 42 U.S.C.A. § 1973 (West Supp. 1983), and the fourteenth and fifteenth amendments to the United States Constitution. Only two districts in Dallas County are at issue in this litigation; both of these are in Dallas County—districts 5 and 24. We have examined meticulously S.B. 480, the evidence presented to us at trial, and the parties contentions in their post trial briefs and we find that S.B. 480 does not violate section 2 or the United States Constitution.

I. *The Parties Contentions and the Districts at Issue.*

The pivotal issue presented to this panel centers around S.B. 480's construction of districts 5 and 24 in Dallas County. Under S.B. 480, the minority population in Dallas is placed into two districts in which minority voters constitute sizeable percentages of the population. Specifically, district 5 has a black population of 19.62% and an hispanic concentration of 12.24%, for a total minority population of 31.86%, while in district 24, the black population constitutes 31.69% of the district and hispanics constitute a 13.15% concentration, for a total minority population of 44.84%.

The Republicans and the NAACP maintain that the legislature's drawing of districts 5 and 24 dilutes minority access to the political process in violation of amended section 2 and the United States Constitution. They argue that the minority community should have been packed into a single "safe" district in which minority voters would compromise approximately 65% of the voting population. Defendants, representatives of the Democratic Party of Texas (Democrats) and the State of Texas, respond contending that minority voters' access to the political process is not diluted by S.B. 480. Indeed, defendants contend that S.B. 480's treatment of Dallas maximizes minority access to the political process by allocating significant minority voting strength among two districts, thereby providing minority voters with the ability to have a significant impact on the electoral process in districts 5 and 24. They maintain that minority voting clout is maximized since the candidates in districts 5 and 24 must be responsive to the significant minority communities in their respective districts.

II. *The Political Thicket: S.B. 480's History and Procedural Evolution.*

Before reaching the merits, we pause to set forth the activities surrounding the 68th legislature's adoption of S.B. 480 and the Attorney General's reaction to S.B. 480's section 5 submission. *See* 42 U.S.C.A. § 1973(c). We also briefly discuss the case history. The following discussion constitutes our findings of fact and will provide the factual framework for our resolution of the merits in section III.

After the dust had settled in *Seamon I*, and the 1982 elections had been carried out under this Court's interim

plan, the Texas Legislature was faced with the task of redistricting the Texas congressional districts in a manner that, hopefully, would comport with section 2 and the United States Constitution. Passed pursuant to article III, § 30 of the Texas Constitution, Tex. Const. art. III, § 30, S.B. 480 constitutes the present Texas congressional redistricting plan and, as will be seen, represents the wishes of an overwhelming majority of the minority and non-minority members of the Texas House of Representatives and the Texas Senate.

In virtually all respects, S.B. 480 mirrors the plan drawn by this Court in *Seamon I*. Only the following seven districts vary from the court-ordered plan used in the 1982 elections: districts 3, 6, 24, and 26, in the Dallas County area, districts 21 and 23 in the Bexar County area, and district 12, in Tarrant County.

S.B. 480 adopted, in its entirety, the court-drawn plan for district 5 in Dallas County, and, essentially, district 24 was readopted by the legislature. While some disagreement was encountered in adopting S.B. 480, the final bill represents the will of the overwhelming majority of the Texas legislators. The bill was adopted by the Texas Senate on May 2, 1983, by a vote of 26 to 5 and was passed by the Texas House of Representatives by a vote of 105 to 31 on May 27, 1983, with minor amendments. The Texas Senate concurred in the house amendments on May 28, 1983, and, the law became effective when Governor White refused to veto or sign the bill.

The voting record of minority legislators on S.B. 480 yields a telling account of the overwhelming support mustered by the new act among minority members of the Texas Legislature. The following chart sets forth the minority members' votes:

TABLE A

MINORITY STATE SENATORS RECORD ON SENATE BILL 480

In Favor:
WASHINGTON (black)
SANTIESTEBAN (Hispanic)
TRUAN (Hispanic)
URIBE (Hispanic)
VALE (Hispanic)

Opposed:
NONE

TEXAS HOUSE OF REPRESENTATIVES MINORITY MEMBERS RECORD ON SENATE BILL 480

Hispanics in favor:

BARRIENTOS	HINOJOSA
BERLANGA	MADLA
CAVAZOS	MARTINEZ, W.
COLLAZO	MORENO, A.
GAMEZ	OLIVEIRA
GARCIA, A.	RANGEL
GARCIA, M.	SALINAS
HALL, W.	TEJEDA
HERNANDEZ	VALLES

(18)

Hispanics Opposed:
MORENO, P. (1)

Blacks in favor:

CARY	LEE, E. F.
DELCO	PRICE
EDWARDS	THOMPSON, S.
HUDSON, S.	WILSON

(8)

Blacks opposed:
NONE

See Defendants Exhibit "A".[1]

Then, S.B. 480 was presented to the Attorney General pursuant to section 5 of the Voting Rights Act for preclearance. 42 U.S.C.A. § 973c. The Attorney General responded favorably and precleared S.B. 480 on September 27, 1983. In preclearing S.B. 480, the Attorney General made the following observations about Dallas County.[2]

> Our analysis is that minorities in Dallas County have participated freely and sometimes decisively in congressional elections. They have participated in coalitions with others of similar persuasions. In fact, that appears to have occurred in last year's congressional election. We have found no evidence that in selecting from among virtually infinite proper options, the legislative judgment was infectected by a racial or ethnic motive. Nor were we able to conclude that S.B. 480 when compared—as the law re-

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1. The evidence also demonstrated that the Texas Legislature was presented with the opportunity to create a "safe" district by readopting S.B. 1, which would create a district comparable to that requested by the Republicans and the NAACP. Senator Craig Washington testified concerning minority legislators' reaction to the proposal:

> Q: Senator Washington, do you recall that during [the] 1983 legislative session, that [S.B. 1's] Dallas configuration was offered [as a] floor amendment by Representative Jackson, in the House?
> A: Yes, sir.
> Q: And do you recall whether that amendment received any support from minority legislators?
> A: It did not. It did not receive one vote.

See Record, vol. 1, at 159.

2. We note the Attorney General's reaction to S.B. 480 only for factual background. We have placed no probative value on the Attorney General's preclearance of S.B. 480. *See Major v. Treen,* Civ. No. 82-1192, slip op. at 2-3, n.1 (E.D. La., Sept. 23, 1983) (three-judge court).

quires (*Beer v. U.S.*, 425 U.S. 130, (1976))—with the congressional districts drawn in 1973 is in any meaningful respect retrogressive. Accordingly, the state has met the burden imposed by the Voting Rights Act with respect to the Dallas districts.

Undaunted by S.B. 480's overwhelming support from minority leglislators and success before the Attorney General, the Republicans and the NAACP filed their petitions claiming that S.B. 480 dilutes minority access to the political process in Dallas County. We scheduled a trial on the merits and the trial was conducted on November 3, 1983 in Austin, Texas. All parties were permitted to introduce evidence and we have received post-trial briefs from the parties. We move to a consideration of the merits.

III. *S.B. 480: Its Validity Under Section 2 and the Voting Rights Act.*

Plaintiffs claims against S.B. 480 follow familiar paths. Initially, plaintiffs claim S.B. 480 has the effect of diluting minority access to the political process in violation of amended section 2. Next, plaintiffs advance constitutional challenges to S.B. 480's drawing of districts 5 and 24. Deferring to the axiom that "cases should be resolved, where possible, on statutory rather than constitutional grounds," we proceed to the section 2 issue. *Major v. Treen*, Civ. No. 82-1192, slip op. at 43.

A. *Section 2.*

While the amendments to section 2 are of recent vintage, we are not the first to interpret section 2's provisions nor the first to apply its principles. Recently,

Judge Politz, writing for a three-judge court, interpreted the amendments to section 2, concluded that amended section 2 was constitutional, and provided valuable insight into section 2 analysis. *See Major v. Treen,* Civ. No. 82-1192, slip op. (E.D. La., Sept. 23, 1983). Moreover, Judge Randall, also writing for a three-judge court recently gave exhaustive treatment to the section 2 amendments and further illuminated the manner in which this Court many analyze a section 2 case, in the context of Dallas County. *See Terrazas v. Clements,* Civ. No. 3-81-2205R, slip op. (N.D. Tex., Jan. 4, 1984). Finding ourselves in substantial agreement with our learned colleagues' analysis of section 2 and the principles of analysis set forth in their opinions, we avoid further expliction of section 2's legislative history and proceed to the merits.

Section 2 presently reads:

> (a) No voting qualification or prerequisite to voting, standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title [which applies the Act's protection to members of any language minority], as provided in subsection (b) of this section.
>
> (b) a violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have

> less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance that may be considered: *Provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.*

42 U.S.C.A. section 1973 (West Supp. 1983) (emphasis added). It is agreed generally that the language of amended section 2 was aimed at codifying pre-*Bolden* case law. *See City of Mobile v. Bolden,* 446 U.S. 55 (1980) (plurality opinion); H.R. Rep. No. 227, 97th Cong., 1st Sess. 29-30; S. Rep. No. 417 at 19-24, 27-28, 1982. U.S. Code Cong. & Ad. News at 192-202, 204-06. Congress also provided an enumeration of several objective factors which would be relevant, yet uncontrolling, in the court's analysis of a section 2 claim. Derived from *White* and *Zimmer,* the factors, which we have fully considered[3] are:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;[4]

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3. Many of these factors were discussed at length in *Seaman I* and our findings on these factors have not changed substantially. What has changed, of course, is the manner in which districts 5 and 24 are drawn.

4. Plaintiffs and defendants are sharply divided on the issue of racially polarized voting. The success of minority coalitions in recent

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which the members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinders their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

S. Rep. No. 417 at 28-29, 1982 U.S. Code Cong. & Ad. News at 206-07; H.R. Rep. No. 227 at 30 (footnotes omitted); *cf. White v. Regester,* 412 U.S. 755, 766-70 (1973), *Zimmer v. McKeithan,* 485 F.2d at 1297, 1305 (5th Cir. 1973) (*en banc*), *aff'd on other grounds sub nom., East Carroll Parish School Board v. Marshall,* 424 U.S. 636 (1976). In addition, Congress cited two other factors that might have limited relevance:

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elections suggests that bloc voting still exists, to a certain degree, in Dallas County. The evidence also indicates that bloc voting is not as extensive as in the past. Nevertheless, we are convinced that "such bloc voting as may exist in Dallas does not operate as the Dallas districts are structured . . . to deny hispanics [or blacks] an equal opportunity to participate in the political process or elect candidates of their choice." *Terrazos v. Clements,* Civ. No. 3-81-2205, slip op. at 51.

> whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group;
>
> whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, standard, practice or procedure is tenuous.

H. Rep. No. 417 at 29, 1982 U.S. Code Cong. & Ad. News at 207 (footnotes omitted); *cf. Zimmer,* 485 F.2d at 1305.

The effect of amended section 2 is clear. To prevail, a section 2 plaintiff must demonstrate that "in the totality of circumstances, the political processes leading to nomination and election were not equally open to participation by the group in question—that its members have less opportunity than did other residents in the district to participate in the political process and to elect legislators of their choice." *White v. Regester,* 412 U.S. at 766; 42 U.S.C.A. § 1973(b). It is axiomatic that the failure of a minority group to translate its voting strength into proportional representation will not suffice to establish a section 2 violation. There simply is no right—statutory or constitutional—to be represented by a member of a particular race. *Whitcomb v. Chavis,* 403 U.S. 124, 156-57 (1971); 42 U.S.C. § 1973(b). With these well-settled rules of substantive law in mind, we proceed to the plaintiffs' claims.

Plaintiffs claim that S.B. 480's treatment of districts 5 and 24 dilutes minority access since it splits a minority community into two districts. According to plaintiffs, the minority population in Dallas County can elect a "candidate of its choice" only if minority voters are

packed into a "safe" district in which the minority population approaches 65% of the overall population. Plaintiffs assert that minority voters have diluted access to the political process unless they can be assured of a safe district.

We are of the opinion that the plaintiffs claims make several assumptions that violate the spirit and letter of section 2 and the Supreme Court's rulings in reapportionment cases. Initially, plaintiffs argument assumes that minority voters are entitled to be represented by a member of their race—that minority voters necessarily are inadequately represented by non-minority candidates. *See, e.g.,* Record, Vol. 1, at 24-28, 75-76, 138. As we have seen, neither assumption has merit under existing precedent; nor do we find factual merit in these assumptions.

Additionally, plaintiffs claims assume that minority voters have greater access to the political process when minority voters are packed into a single safe district.[5] Yet, as many courts have noted "[t]here is no agreement on whether the political interest of a minority group are best maximized by an overwhelming majority in a single district or a substantial proportion of the voters in a number of districts." *Turner v. McKethan,* 494 F.2d 191, 197 n.24 (5th Cir. 1973). *United States v. Board of Supervisors of Forrest Co.,* 571 F.2d 951, 965 and n.10 (5th Cir. 1978) ("The answer cannot be gleaned from academic commentators; the diversity of their opinions only serves to confirm the difficulty of the choices. . . ."). While plaintiffs claims make for a most difficult and in-

5. Plaintiffs do not contest the fact that creating a "safe" district necessarily would require substantial dilution of minority concentration in at least one district—the district from which minorities are extracted to be packed in the "safe" district.

teresting academic issue, they do not provide the basis for a finding of a section 2 violation.

In drawing districts 5 and 24, the Texas Legislature was required to grapple with this issue in the context of Dallas County. Obviously, the legislature concluded that the minority population in Dallas should be placed into two districts. It does not follow necessarily; indeed, it may not follow at all, that the legislature's decision was infected by a racial motive or that the result of the legislature's decision is to dilute minority access to the political process.

While the legislature's intent in drafting section 2 is, by no means controlling on the section 2 issue, it does constitute relevant evidence. *Major v. Treen,* Civ. No. 82-1196. slip op. at 67. The evidence presented to us convincingly demonstrated that political considerations provided the critical stimuli for S.B. 480's adoption. *See Appendix A.* As can be expected, redistricting commands undivided attention from those candidates whose districts lie on the cutting board of reaportionment. In this case, the evidence indicates that political support for incumbents played a large role in S.B. 480's adoption. Such motivations are generally present in redistricting decisions and we find no authority condemning such considerations under section 2 principles. *See Gaffney v. Cummings,* 412 U.S. 735, 733 (1973).

The legislature's decision to adopt S.B. 480 was guided by extensive minority input. The legislature was presented with the "Comment on the Texas Congressional Redistricting Submission by the Black and Hispanic Members of the Texas Legislature," which vehemently opposed the concentration of minorities in district 5, as requested by

Republicans and the NAACP in this case. *See* Defendant's Exhibit M. The minority voting record also evinces legislative responsiveness to minority concerns. *See* Table A, Section II, supra; fn.1 supra. Simply put, the evidence presented to us demonstrated that the legislative decision to adopt S.B. 480 resulted primarily from a desire to protect certain incumbents and to respond favorably to minority concerns. No basis for a finding of racial intent has been presented. Nevertheless, a finding of no racial intent does not remove S.B. 480 from the provisions of amended section 2. A finding that S.B. 480 had the effect of diluting minority access would suffice.

As noted previously, the courts and scholars are disturbingly undecided on the issue of whether minority voters are best represented by two impact districts or one safe district. Whether a general rule could be discerned that would have any consistent result in application is doubtful. The myriad different political circumstances existing in different districts would seem to defy generalizations. Fortunately, we need not resolve the general issue in this proceeding. We need only decide, under the totality of the circumstances in this case, whether the legislature's decision to create two impact districts instead of one safe district resulted in unequal access to the political processes leading to nomination and election in districts 5 and 24, so that the minority populations in those districts had less opportunity than did other residents to participate in the political process and elect candidates of their choice. We find no such evidence.

The evidence presented to us demonstrates that minority voters exert a significant impact in districts 5 and 24,

play pivotal roles in key elections, and are capable of selecting responsive, sensitive candidates of their choice. Past elections support these findings. In the 1978 general election, Congressman Martin Frost, an anglo, lost the anglo vote in district 24 by approximately 5,000 votes, but carried the black precincts by approximately 11,000 votes, thus winning the election by 5,857 votes. Similarly, in both the 1978 and the 1980 general elections, former Congressman Jim Mattox, an anglo, lost the anglo vote by a significant margin, but carried over 90% of the black vote in both elections. Mattox won the 1978 general election by 852 votes and the 1980 general election by 3,444 votes. Clearly, the significant minority populations in districts 5 and 24 controlled the outcome of these crucial elections. Strikingly, the only witness presented by the Republicans at trial, Mr. Lee Jackson, conceded that election returns established that minority voters can swing an election in districts 5 and 24. Mr. Jackson stated:

> There is one election in which one can clearly say that the minority community provided the decisive factor in the marginal victory in the general election of 1978, when Congressman Frost defeated Leo Berman, a Republican candidate, the Republican candidate received a majority of support in the white voting precincts of the district, Congressman Frost received significant support in minority community, and that appears to have been certainly a major factor, and decisive factor in that election.

See Record Vol. 1 at 219.

Election results in 1982 in both districts 5 and 24 once again demonstrated the significant influence of minority voters in these districts. Congressman Frost,

an anglo, received 94 percent of the black vote in the 1982 general election against Mrs. Lucy Patterson, a black former member of the Dallas City Council. In those precincts that were over 90 percent black, Congressman Frost received 21,901 votes to Mrs. Patterson's 1,426. Similarly, in district 5, Congressman Bryant received 2,284 of the votes cast in 19 predominantly black precincts while his black opponent, J. B. Jackson, received only 1,243. In the general election, Congressman Bryant received 97.6 percent of the vote in these precincts.

Because of the overwhelming support both Congressman Frost and Congressman Bryant received among black voters, it is not surprising that both men have established strong records of support for the concerns of black voters. Indeed, both Congressman Frost and Congressman Bryant received the NAACP's highest excellent rating in a recent NAACP study for their votes on issues of special importance to the minority community. *See* Defendant's Exhibit O; *see also* Record, Vol. I, at 220.

Finally, we note that the plaintiffs do not contend that they were not afforded the opportunity to present their views at every step of the legislative process or that the actual processes leading to nomination and election of candidates in districts 5 and 24 are not fully open to minority voters. Indeed, Judge Parker asked NAACP witness Mr. Theodore Watkins the following question:

> "Q: I ask you, again, did you not have full access to participation in the legislative process as far as expressing your viewpoint, with concern at the various levels?
>
> A: Yes."

Record, Vol. I, at 77-78.

B. *Constitutional Validity.*

We have little difficulty concluding that plaintiffs have failed to prove a constitutional violation. We have already concluded that S.B. 480 does not have the effect of diluting minority access to the political process. As Judge Randall noted recently "[i]n the absence of discriminatory result, there must be some doubt whether a showing of intent could even suffice." *Terrazas v. Clements,* Civ. No. 3-81-2205-R, slip op. at 75. Nevertheless, we have also concluded that the legislature's decision to adopt S.B. 480 was not infected by a racial intent. *See* Section III, a, *supra.* Absent a finding of discriminatory effect or intent, there can be no constitutional violation. *Rogers v. Lodge,* 458 U.S. 613, 616-22 (1982); *City of Mobile v. Bolden,* 446 U.S. 55, 66-71 (1950) (plurality opinion of Stewart, J.J.; *accord id.* at 99-101 (White, J., dissenting).

CONCLUSION.

When first we were thrust into this political thicket, we were confronted by a Texas congressional reapportionment plan that had failed to obtain section 5 preclearance, a plan, that in the Court's view, impermissibly diluted minority access to the political process in Dallas County and in portions of south Texas. As best we could, we undertook the "unwelcomed obligation" of fashioning a court-ordered plan that had neither a racially discriminatory purpose nor such an effect. After an appeal to the Supreme Court, the 1982 elections were conducted pursuant to the court-ordered plan.

Since our first tangle in this political thicket, many things have happened. Congress amended section 2 of the Voting Rights Act and deleted the intent requirement

provided for in the original act. Thereafter, the Texas Legislature convened in regular session and passed S.B. 480, a new congressional reapportionment plan that virtually mirrors the prior court-ordered plan. Finally, S.B. 480 was precleared by the Attorney General. Nevertheless, plaintiffs filed this action alleging violations of section 2 and the United States Constitution. In light of these occurrences, and in light of the evidence presented to us at trial, we have examined S.B. 480 carefully and conclude that its provisions do not violate section 2 or the United States Constitution. Accordingly, we gladly exit the political thicket and return the task of reapportionment to its appropriate arena—the Texas Legislature.

DEFENDANT'S EXHIBIT 1

TEXAS DEMOCRATIC PARTY

May 25, 1983

Dear Fellow Democrat:

Upon recess Wednesday, noon, the House Democratic Caucus will meet in the old Supreme Court Room on the third floor to discuss the Uher-Mauzy Congressional Redistricting Bill, S.B. 480, which will be on Thursday's calendar.

AS CHAIRMAN OF THE TEXAS DEMOCRATIC PARTY, I RESPECTFULLY REQUEST THAT YOU VOTE FOR THE UHER-MAUZY PLAN WITH NO AMENDMENTS.

Should this Bill fail, three Democratic Congressmen would be jeopardized; Vandergriff, Bryant and Kazen. Therefore, I cannot overstate the importance of the passage of this plan in this form to the Texas Democratic Party.

The Speaker agreed to take up Congressional Redistricting in this Session only if we could get a plan that our Democratic Congressmen could unanimously agree to, and, that we were willing to support without amendments. The Uher-Mauzy Bill embodies that agreement.

This is not a perfect plan. This is not the best conceivable plan from a Democratic Party viewpoint. But it is the best plan that we can pass under the set of circumstances that we find ourselves. Consequently, I have no reservation about asking you to vote to adopt this plan.

Please give the Democratic Party and these three imperiled Congressmen your help and your vote on this vital issue.

Democratically yours,

/s/ BOB SLAGLE
Bob Slagle

BS/gc

Appendix A-2

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
PARIS DIVISION

CIVIL ACTION NO. P-81-49-CA

A. M. SEAMON

versus

CHET UPHAM, ET AL

STEGER, District Judge, dissenting.

As the majority here today reaches a conclusion which I do not believe realistically reveals the total record we have before us, I must respectfully dissent. It is my opinion that, based on the standards by which we are bound under Section 2,[1] the only result to be reached is that Senate Bill 480 denies the minority population of Dallas County[2] equal access to the participation in the electoral processes and thus prevents them from enjoying the opportunity to elect the representative of their choice. Furthermore, although I am well aware of our duty to focus first on potential statutory violations, this plan raises serious questions about what appears to be an attempt to dilute the voting strength of a cognizable

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1. 42 U.S.C. § 1973.

2. As the majority has noted, there are apparently only two districts still at issue. These are Districts 5 and 24 in Dallas County.

political group, i.e. the Republican Party, in Dallas County in violation of the Equal Protection Clause.[3]

I.

In regard to the claims concerning Section 2,[4] there seems to be some confusion as to what the National Association for the Advancement of Colored People (NAACP) and the Republican Party of Texas (Republicans) seek to accomplish through this lawsuit. From an examination of the allegations and assertions in their pleadings, as well as the evidence and arguments presented at the November 30 hearing, it seems clear that they are not seeking a plan that would *guarantee* the election of a black, Hispanic, or Republican congressman from one of the Dallas County districts. Indeed, such a "guarantee," as they well recognize, has been held numerous times not to fall within the purview of either Section 2 or the Fourteenth or Fifteenth Amendments. Nor does it appear that either party asserts the right to proportional representation.[5] As Congress has specifically expressed in the language of the statute, the right of a particular racial, ethnic, religious or political group to be represented in proportion to their presence in the population has no statutory basis.[6]

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3. *See Karcher v. Daggett*, ____U.S.____, 103 S.Ct. 2653, 2667-76 (1983) (Stevens, J., concurring).

4. 42 U.S.C. § 1973.

5. *See White v. Regester*, 412 U.S. 755, 765-66 (1973); *Whitcomb v. Chavis*, 403 U.S. 124, 156-57 (1971).

6. The proviso contained in 42 U.S.C. 1973 states:
"... Provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."

It appears that the sole purpose of their attack on S.B. 480 is to insure equal opportunities (not only in the primaries, but also in the general elections) to participate in the political process leading toward the election of the candidate of their choice and not to be relegated to the task of making a partisan choice between candidates selected by a white majority.

As noted by the majority, the standard by which we must examine a redistricting plan under Section 2 is whether, under the totality of the circumstances, the plan acts to deny the group in question equal access to the political processes leading to the nomination and election in that its members have less opportunity than do other residents of the district to participate in the political process and to elect the representative of their choice.

Thus, once we cut through all of the underbrush of this "political thicket" in which we are entangled, the real issue in controversy becomes apparent: Whether the political interests of a minority group are best maximized by a majority in a single district or a substantial proportion of the minority voters in a number of districts. Despite the position of the majority that this question remains virtually unsettled, this writer cannot help but notice that courts have consistently condemned redistricting plans that sought to fragment cohesive or centralized minority populations under the guise of giving the minorities "influential" or "swing" power in several districts. *Major v. Treen,* Civ. No. 82-1191, Slip Op. (E.D. La. September 23, 1983). *See also White v. Regester,* 412 U.S. 755 (1973); *Nevett v. Sides,* 571 F.2d 209 (5th Cir. 1978); *Kirksey v. Board of Supervisors,* 554 F.2d 139, 149 (5th Cir. 1977); *Robinson v. Commissioner's*

Court, 505 F.2d 674 (5th Cir. 1974); *Carstens v. Lamm*, 543 F.Supp. 68 (D. Colo. 1982). These courts have consistently recognized that fragmentation invariable results in a minimization of minority voting power and political access. Yet, as will be seen, the fragmentation of the Dallas County minority community wrought by S.B. 480 is sought to be justified by an argument that it gives them increased political strength.

The majority opinion's express reason for allowing the fragmentation of the Dallas County minority population is the assertion that minority voting strength will be increased by giving majorities "swing vote" influence in two congressional districts, as opposed to influence in only one minority controlled district. This Court's majority theorizes that S.B. 480's plan for districts 5 and 24 gives Dallas County minorities the ability to elect two candidates of their choice instead of only one candidate elected from a "safe" minority district. However, the two candidates elected by S.B. 480's configuration of districts 5 and 24, would be the choice of the minority community only in an indirect manner. "Choice," as contemplated by the majority opinion, exists only in the sense that the elected candidate will have supposedly promised "responsiveness" to minority concerns and viewpoints in exchange for their supposedly decisive swing vote influence in his or her election. Even if this swing vote scenario manifests itself as contemplated in both the district 5 race and the district 24 race, I cannot agree with the majority that these representatives would necessarily be the choice of Dallas County minorities. This is so because their premise does not differentiate between the ability to nominate, campaign for, and ultimately elect a chosen person, as opposed to the ability to only decide

between candidates previously selected by the white majorities of the competing political parties. The latter set of circumstances are the facts faced by the Dallas County minority population today, as amply demonstrated by the record in this case.

For the theory embodied in S.B. 480 to function, the minorities in Dallas County must have the leverage of a crucial swing vote in two congressional races in order to insure that their views will be considered by the candidate seeking their decisive influence on the election. This swing vote is virtually the only asset the minorities have. However, there is no assurance that this asset will always be of value in a given election. In order for Dallas County minorities to exercise any influence in congressional elections via a swing vote, those congressional races must, by definition, be almost even. If those races are lopsided contests, however, the minority swing vote advantage may disappear.

To illustrate, the evidence presented was that in partisan general elections, minority voters in Dallas County vote 90-95% for the Democrat candidate, no matter what. Because minorities in Dallas County have not shown a tendency to switch their votes to a Republican candidate when the Democrat candidate proves to be unacceptable, their vote has become almost captively Democrat. Therefore, if the Democrat candidate is trailing badly behind his or her Republican opponent among white voters in the district, the captive minority vote will rarely be enough to make up the difference. On the other hand, if the Democrat defeats the Republican candidate among white voters in the district, then it follows that the minority vote did not decide the election, it

only increased the Democrat's margin of victory. In either situation, the minority community's chief resource, their swing vote, never materialized. About the only situation where the minority vote could be a decisive factor is where the Democrat is close enough behind the Republican in the white vote to allow the Democrat minority vote to make a difference. Even in this last circumstance, the minority vote may not always translate into political influence because their support is almost automatic for the Democrat candidate.

Admittedly, the 1978 general elections of Congressman Martin Frost and Jim Mattox, as well as Mattox's 1980 general election victory, seem to illustrate situations where the Democrat minority vote has made a difference. However, if in future elections the white majority in districts 5 or 24 decide to overwhelmingly support the Republican candidate, or for that matter, the Democrat candidate, the minority community's swing vote influence vanishes as also well may the elected candidate's responsiveness to the minority's interests. More importantly, even if the general elections in districts 5 and 24 are decided by the minority vote, the winning Democrat candidate may only have been viewed by the minority community as the best of the worst—not their true choice for a representative. In all probability, the real choice of the minority community may already have been defeated in the Democrat primary by the candidate of choice of the white majority. This is doubly frustrating because the only real voice minority voters have in Dallas County is in the Democrat primary elections.

In the Democrat primary elections, as opposed to the general elections, minority voters do shift their vote be-

tween competing Democrat candidates. Once again, however, this type of swing vote influence only works if the white majority vote is fairly evenly divided between candidates. If the white Democrat majority in districts 5 or 24 are solidly in favor of one Democrat candidate over the others, that candidate will win the primary election. This is true even if that candidate is hostile to or simply ignores the interests of the minority community; they will simply not have enough votes to override the white Democrat majority in the district. When this same candidate who won without minority support in the primaries faces a Republican candidate in the general elections, that candidate need not be overly sensitive to minority interests because he or she knows the minority citizens of Dallas County will most probably vote Democrat and not Republican. Under these circumstances, although minority voters cast their ballot in favor of the Democrat candidate, that candidate could not under any stretch of the imagination be considered the candidate of choice for the minority community. Many minority voters may not be interested in making a choice between two candidates, neither of which is sympathetic to their goals and interests, and not vote at all. Many worthy and promising minority citizens of Dallas County may believe there is no hope of success in a district controlled by white majorities at both the primary and general election stages and choose not to seek political office or choose to not even become involved in the political process in Dallas County. This degree of political nonparticipation, while not expected in Dallas County, is certainly possible when a compact, contiguous and highly concentrated minority community is divided into two separate voting units.

Because of the history of official discrimination in voting rights in Dallas County, the multimember districts that had been used in Dallas County until struck down in *White v. Regester,* 412 U.S. 755 (1973), the effects of past discrimination in such areas as education, employment and health, the fact that Dallas County has never elected a black congressman, and most importantly, because of the existence of racially polarized voting in Dallas County, which I find to have been sufficiently proven by the evidence contained in the record, I believe that Section 2 of the Voting Rights Act would be violated by fragmenting the Dallas County minorities in two congressional districts. On the other hand, a 65% minority population in district 24, as advocated by the Plaintiffs in this case, would assure Dallas County minorities that they would have a real opportunity to equally participate in the selection and election of candidates of their choice.

II.

It may well be true, as the majority states, that "while the legislature's intent in drafting S.B. 480 is by no means controlling on the Section 2 issue, it does constitute relevant evidence" to consider. Majority Opinion, *supra.* However, the document on which they rely as indicative of the legislature's intent evidences the very denial of access of which the Plaintiffs complain. *See Appendix A.* This document, in eliciting support for the passage of S.B. 480, actively promotes the maintenance of district lines so as to protect incumbent white Democrat congressmen. Such a consideration is, in and of itself, not prohibited by our courts.[7] However, when this partisan-

7. *Karcher, supra* at 2671-72; *Gaffney v. Cummings,* 412 U.S. 735, 753-54 (1973).

based consideration has an impact on the political opportunities and participation of the minorities in those districts, it then becomes a relevant factor in analyzing the results of a particular plan under Section 2. Furthermore, where this partisan consideration is incorporated into a redistricting plan (such as in S.B. 480) to close the door on political access to a particular group of voters, it should be looked upon with disfavor. *See Karcher,* 103 S.Ct. at 3671-72. It is apparent from the legislative history of Section 2 that this was one of the very types of practices that Congress was seeking to overturn with its amendments and the addition of Section 2(b), i.e., the use of what appears to be a racially neutral purpose, which when examined in the context of the "totality of the circumstances" surrounding the plan and its formation, acts to deny certain minority groups the access Congress intended to provide through Section 2.

As one can glean from the numerous pages of the legislative history of the amendments to Section 2, Congress skillfully recognized the difficulty of proving that a legislature intended to promote a racially unfair result. Rarely do we find an open and overt racially discriminatory purpose or practice set in place within a state's political processes. But, as our courts have become well aware, the political machines have become skillful tacticians in maintaining the subtle remnants of institutional discrimination in an effort to achieve the results they desire. While this writer cannot openly accuse our state legislature of such wrongful motives, it is obvious that Congress intended that the courts not focus on the individual trees of purpose and intent; but that the court should step back, perhaps outside the political thicket, and determine

whether the forest, as a whole, grows truly within the bounds of Section 2.

Based upon the foregoing, it is my firm belief that the evidence presented by the NAACP and the Republican Party of Texas has proven that S.B. 480's split of the Dallas County minority community into two congressional districts affords minority citizens of Dallas County less of an opportunity and incentive to participate in the political process and to elect representatives of their choice. Therefore, S.B. 480, as it relates to proposed districts 5 and 24, violates section 2 of the Voting Rights Act and should not be allowed to stand.

III.

Even assuming that Senate Bill 480 measures up to the requirements of Section 2 as to minority access and participation, I feel it imperative that the following observations should be made with regard to the allegations of constitutional violations. In the analysis of the constitutional validity of this plan, the majority, in wading through the bogs of this state's attempts at redistricting, has consistently ignored the outcry of not only a substantial number of minority voters but also the minority political organization of this state.

It has long been noted by the Supreme Court that the guarantees of the Equal Protection Clause against invidious discrimination extend to voting rights and political groups as well as economic units, racial communities, and other entities. *Karcher v. Daggett,* 103 S.Ct. at 2669; *Williams v. Rhodes,* 393 U.S. 23, 39 (1968) (Douglas, J., concurring). *See also Gaffney v. Cummings,* 412 U.S. 735 (1973); *Abate v. Mundt,* 403 U.S. 182 (1971).

In fact, the Court has consistently recognized "that 'dilution' of the voting strength of cognizable *political* as well as racial groups may be unconstitutional". *Karcher, supra* (and the cases cited therein). As Justice Stevens noted in his concurrence in *Karcher*:

> There is only one Equal Protection Clause. Since the Clause does not make some groups of citizens more equal than others, see *Zobel v. Williams*, 45 U.S. 55, 102 S.Ct. 2309, 2317, 72 L.Ed.2d 672 (1982) (Brennan, J., concurring), its protection against vote dilution cannot be confined to racial groups. As long as it proscribes gerrymandering against such groups, its proscription must provide comparable protection for other cognizable groups of voters as well.

Karcher, 103 S.Ct. at 2669.

Throughout the examination of the legislative history and background of Senate Bill 480, I am ever reminded that a finding of a constitutional violation requires evidence of intent or purpose on the part of the legislature to discriminate against a defined group of voters. In regard to the particular districts in question, it appears that the 1983 Legislature that enacted S.B. 480 was strongly concerned with the need to draw the district lines so as to protect the incumbent white Democrat Congressmen rather than with whether the plan provided a neutral, constitutionally sound redistricting scheme. *See Appendix A*. It may be true that this plea for the support of S.B. 480 does not necessarily provide *direct* evidence of intent on the part of the Democrat-controlled legislature. However, even the majority conceded that this evidence "convincingly demonstrated that political considerations provided the critical stimuli for S.B. 480's adoption." *Supra.*

Thus, it would appear that such evidence of partisanship may well provide an inference that a major purpose behind the configuration of the Dallas County districts was to discriminate against the minority political party by creating districts that would protect Democrat congressmen. It would be impractical to promote the idea that a State's redistricting plan could be invalidated simply because partisan political considerations provided the basis for some of the line-drawing decisions. *See Karcher, supra* at 2671. As noted in *Karcher,* it would be "unrealistic to attempt to proscribe all political considerations in the essentially political process of redistricting." *Id.* at 2671-72. However, where the plan has "a significant adverse impact upon a definite political group," the presence of a discriminatory intent on the part of the legislature may well place the plan outside the boundaries of constitutional compliance.

The dilution or minimization of the voting strength of identifiable groups of voters, including political groups, has been noted by one famous commentator as occurring in one or two ways.[8] A redistricting plan may "pack" the members of the group into one or a few "safe" districts, giving them control there, but limiting their impact outside those districts. On the other hand, a plan may spread out or "fragment" the group, thus giving them some impact in several districts, yet preventing them from securing a substantial majority in any district.[9]

It is my opinion that the redistricting plan for the Dallas area districts under Senate Bill 480 has a significant adverse impact on the voting strength of the Re-

8. L. Tribe, American Constitutional Law 756 (1978).

9. *Id.* at 756, n. 2. *See also Karcher, supra* at 2672, n. 13.

publican Party in Dallas County. The fragmentation and placing of portions of the minority communities within the various districts in Dallas County acts to minimize the strength of the Republicans in districts where they could potentially hold a majority. Such a dilution of this party's political power denies to the guarantees recognized and afforded under the Equal Protection Clause.

CONCLUSION

As we come to what many had hoped would be the end of the Texas Legislature's quest for a redistricting scheme, this Court has endeavored to hold true to the premise that "reapportionment is primarily a matter for legislative consideration and determination." *Reynolds v. Sims,* 377 U.S. 533, 586 (1964). We have sought to intrude upon state policies and preferences only when necessary to guide the various plans into statutory and constitutional compliance. It is the opinion of the majority here today that Senate Bill 480 provides a statutorily and constitutionally sound plan that has neither a racially discriminatory purpose nor such an effect. However, as one might gather from my comments above, it is my opinion that the plan, as currently drawn, not only denies minorities in the Dallas County districts equal access and opportunity in violation of Section 2, but also reflects a purpose on the part of the Legislature to run afoul of the Equal Protection Clause. Accordingly, I cannot join my learned colleagues in their endorsement of S.B. 480.

/s/ WILLIAM M. STEGER
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
PARIS DIVISION

CIVIL ACTION NO. P-81-49-CA

A. M. SEAMON

v.

CHET UPHAM, ET AL.

(Filed February 14, 1984)

J U D G M E N T

Before JOHNSON, Circuit Judge, PARKER and STEGER, District Judges.

Pursuant to the Memorandum Opinion entered on January 30, 1984, Judgment is hereby entered for the defendants. Each side is to bear their own costs.

SIGNED and ENTERED this 13th day of February, 1984.

/s/ ROBERT M. PARKER
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
PARIS DIVISION

CIVIL ACTION NO. P-81-49-CA

REVEREND A. M. SEAMON

v.

CHET UPHAM, ET AL.

(Filed March 15, 1984)

ORDER

Before JOHNSON, Circuit Judge, PARKER and STEGER, District Judges.

Comes now the motion of George Strake for Rehearing or New Trial, and the majority of this Court after reviewing said motion is of the opinion that it should be in all things denied.

Judge Steger is of the opinion that the motion should be granted for the reasons stated in his dissent.

Accordingly, by majority of this Court, George Strake's Motion for Rehearing or New Trial is DENIED.

SIGNED and ENTERED this 15th day of March, 1984.

/s/ ROBERT M. PARKER
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

CIVIL ACTION NO. P-81-49-CA

REVEREND A. M. SEAMON

v.

CHET UPHAM, ET AL.

(Filed February 23, 1984)

MOTION FOR REHEARING OR NEW TRIAL

TO SAID HONORABLE COURT:

COMES NOW George W. Strake and since his motion for rehearing filed on February 9, 1984, pre-dated the February 13, 1984 Judgment of the Court against him, Strake refiles this motion for a rehearing or new trial in this case and as grounds therefor would show the following:

Judge Steger has concluded in his dissenting opinion that the evidence presented proved that Senate Bill 480, as to Dallas County, unconstitutionally dilutes the voting rights of a cognizable political group, i.e., the Republican Party, in violation of the Equal Protection Clause. If the Judges who constituted the majority in upholding Senate Bill 480 did not consider, as Judge Steger did, whether the evidence proved such a violation, then George Strake

requests a rehearing or new trial so that they may consider it.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Motion for Rehearing or New Trial has been mailed to all counsel of record on this 22nd day of February, 1984.

/s/ DAVID HERNDON
David Herndon

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

CIVIL ACTION NO. P-81-49-CA

REVEREND A. M. SEAMON

v.

CHET UPHAM, ET AL.

(Filed April 10, 1984)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

A majority of the Trial Court rendered an opinion in this case on January 30, 1984. On February 9, 1984, George W. Strake, Jr. filed a Motion for Rehearing or New Trial based on the aforementioned opinion and the dissent thereto. On February 13, 1984, the Trial Court entered a Judgment against Plaintiff George W. Strake, Jr. based on the aforementioned opinion. This Judgment did not refer to Strake's Motion for Rehearing or New Trial and so on February 23, 1984, Strake filed another Motion for Rehearing or New Trial on the same grounds as his first motion. On March 12, 1984, Strake filed his Notice of Appeal to the Supreme Court of the United States. On March 15, 1984, the Trial Court denied Strake's Motion for Rehearing or New Trial. To avoid any question about the efficacy of Strake's prior Notice of Appeal and to add that Strake is also appealing from the denial of his Motion for Rehearing or New Trial, this Notice of Appeal is given and filed.

Notice is hereby given that George W. Strake, Jr., Plaintiff in the above entitled cause, hereby appeals to the Supreme Court of the United States from the Judgment entered by this Court on February 13, 1984, denying injunctive relief against the use of Texas Congressional Districts 5 and 24 in Dallas County, Texas, as enacted by Senate Bill No. 480, Regular Session of the 68th Legislature of Texas, and from the Order entered by this Court on March 15, 1984, denying Strake's Motion for Rehearing or New Trial.

This appeal is taken pursuant to 28 U.S.C. § 1253 and 42 U.S.C. § 1973(c).

DATED Aprii 5, 1984.

Respectfully submitted,

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George W. Strake, Jr.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Notice of Appeal to the Supreme Court of the United States has been mailed to all counsel of record on this 5th day of April, 1984.

/s/ DAVID HERNDON
David Herndon

Office-Supreme Court, U.S.
FILED
JUL 9 1984
ALEXANDER L. STEVAS,
CLERK

NO. 83-1823

* * * * * * *

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

* * * * * * *

GEORGE W. STRAKE, JR.,

Appellant,

v.

A.M. SEAMON, ET AL.,

Appellees.

* * * * * * *

On Appeal From The United States District Court
For The Eastern District of Texas

* * * * * * *

MOTION TO DISMISS OR AFFIRM

* * * * * * *

JIM MATTOX
Attorney General of Texas

DAVID R. RICHARDS
Executive Assistant
Attorney General

Attorneys for Appellees

BEST AVAILABLE COPY

SUMMARY OF THE ARGUMENT

I.

By his First Question, Appellant asks this Court to find that a legislatively created redistricting plan that maintains established minority voting strength in two congressional districts rather than concentrating minorities in one district violates both the Voting Rights Act and the Constitution. Based on a factual review of the totality of the circumstances, the three-judge court below concluded that the legislative plan did not exclude minorities from the electoral process in violation of either the Voting Rights Act or the Constitution. Appellant does not allege that this factual conclusion was either clearly erroneous or the result of a misapplication of the law. Instead, Appellant seeks independent factual review and reweighing of the evidence by this Court. Such a review is prohibited by Rule 52(a) of the Federal Rules of Civil Procedure. Further, the First Question does not present a substantial legal issue.

II.

By his Second Question, Appellant asks this Court to find that the legislatively created redistricting plan violates the voting rights of Republicans under the Constitution. This claim was not presented below. It was never identified as an issue at the pretrial conference, and was not the subject of evidence introduced at trial or a final judgment of the three-judge court. As such, this Court lacks jurisdiction to hear this claim on appeal for the first time. Even if this Court has jurisdiction, the longstanding policy of this Court is to retain from hearing claims not fully presented below.

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NO. 83-1823

* * * * * * * *

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

* * * * * * * *

GEORGE W. STRAKE, JR.,

Appellant.

v.

A.M. SEAMON, ET AL.,

Appellees,

* * * * * * * *

On Appeal From The United States District Court
For The Eastern District of Texas

* * * * * * * *

MOTION TO DISMISS OR AFFIRM

* * * * * * * *

Appellees Mark White, Governor of the State of Texas, and John Fainter, Secretary of State of the State of Texas respectfully pray that this Court dismiss this appeal for lack of jurisdiction and, in the alternative, that this Court affirm the judgment of the United States District Court for the Eastern District of Texas entered on February 13, 1984 on grounds that the appeal of said judgment does not present this Court with a substantial question.

STATEMENT OF THE CASE

This is a voting rights case brought under 42 U.S.C. § 1973 and the Fourteenth Amendment challenging the Texas Legislature's 1983 redistricting of the State's congressional districts. Only two congressional districts, Districts 5 and 24 in Dallas County, are involved in this appeal.

In 1981, the Texas Legislature enacted Senate Bill 1 (S.B.1), dividing the State into twenty-seven congressional districts. Under S.B.1, Dallas minority groups were concentrated or "packed" into District 24 where they comprised a majority of the population but less than a majority of the registered voters. In District 5, they comprised a mere 10.11 percent of the voting age population. This was a dramatic change from the historical configuration of these two districts under which minorities had been more evenly distributed between the two districts.

S.B.1 was challenged from various direction; one claim was from minorities attacking the loss of total voting strength in two districts that resulted from the "packing" of minority population into a single district. Following Justice Department refusal to preclear S.B.1, the three-judge court entered an interim plan redistributing minority voting strength to both districts. This interim plan was appealed to the Supreme Court by Defendants, who won a remand.

Subsequent litigation over S.B.1 effectively became mooted in 1983 when the Texas Legislature enacted a second congressional redistricting plan, Senate Bill 480 (S.B.480). S.B.480 modified two South Texas congressional districts to address minority concerns in District 23 and adopted essentially the Court's interim order in Dallas Districts 5 and 24, as well as the Court's plan for Districts 15 and 27 in the Gulf Coast area. On September 27, 1983, the United States Department of Justice precleared S.B.480.[1]

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[1] In preclearing S.B.480, the Attorney General stated that "Our analysis is that minorities in Dallas County have participated freely and sometimes decisively in congressional elections... We have found no evidence that in selecting from among the virtually infinite proper options, the legislative judgment was infected by a racial or ethnic motive. Nor were we able to conclude that S.B.480 ... is in any meaningful respect retrogressive. Accordingly, the state has met the burden imposed by the Voting Rights Act with respect to the Dallas Districts," *See* Appendix A.

Following enactment and preclearance of S.B.480, Appellant George Strake, Jr., State Chairman of the Republican Party of Texas, was substituted for the prior party chairman, Chester Upham, Jr. A realignment of the parties also followed, leaving Strake as a Plaintiff. By a pleading filed by Strake in October 1983, Strake challenged S.B.480 on behalf of minority voters in congressional Districts 5 and 24. The pleading filed by Strake made *no claim on behalf of Republican voters.* After a full evidentiary hearing before the three-judge court, a majority of the Court issued an opinion and judgment upholding the configuration of Districts 5 and 24 under S.B.480. In its opinion the court majority found no evidence of unequal access to the political process, finding instead that "the evidence presented to us demonstrates that minority voters exert a significant impact in Districts 5 and 24, play pivotal roles in key elections, and are capable of selecting responsive, sensitive candidates of their choice." Jurisdictional Statement at A-1-14 — A-1-15. Based on the dissenting opinion of the third judge, Appellant sought, but was denied, a motion for rehearing or new trial.

INTRODUCTION

In 1983, the Texas Legislature enacted S.B.480, which redistricted Dallas County congressional districts such that minority voters retained significant influence in two congressional districts rather than being concentrated or "packed" into a single congressional district. Based on a review of a totality of the factual circumstances, the three-judge court concluded that there has been neither intentional racial discrimination nor abridgment of minority voting rights. Appellant now asks this Court to focus on the single fact that minority voters could have constituted a population majority[2] in a packed district, and, on that basis, to reverse the three-judge court. To do so, this Court would have to abandon two well-established principles.

First, it would have to ignore the trial court's factual findings and substitute its own reweighing of the evidence in violation of the clearly erroneous rule embodied in Rule 52(a) of the Federal Rules of Civil Procedure. Second, it would have to abandon the well-established rule that voting rights cases are to be

[2]This "majority" was not a voting majority. Minority voters, blacks and Hispanics combined, constituted less than half of the proposed district's registered voters.

evaluated based on the totality of the circumstances rather than on a single factor.

Appellant also claims that the legislative redistricting plan is a result of intentional discrimination against Republicans. This is a claim not previously presented during this extended litigation. Consequently, this Court lacks the jurisdiction to hear the claim for the first time on appeal. Even if this Court has jurisdiction, review of a distinct cause of action raised for the first time on appeal would violate the long-standing practice of this Court of declining to hear issues not raised and fully presented below.

THE FIRST QUESTION

1. Appellant Seeks a Facutal Review and Reweighing of the Evidence that is Prohibited by Rule 52(a) of the Federal Rules of Civil Procedure.

By his First Question, Appellant asks this Court to determine that, contrary to the finding of the three-judge court below, the Congressional redistricting plan adopted by the Texas legislature and precleared by the Department of Justice[3] had both the purpose and effect of discriminating against minority voters. Appellant does not directly challenge either the accuracy or sufficiency of the district court's factual findings. Instead, what Appellant seeks is an independent factual review and reweighing of the evidence by this Court. As this Court has indicated on numerous occasions, such an independent factual review and reweighing is prohibited by Rule 52 of the Federal Rules of Civil Procedure.

Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, is a legal prohibition against any voting practice that "results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color..." The factual showing necessary to prevail on a Section 2 claim is expressly stated in the statute: a plaintiff must show that "based on the totality of circumstances, it is shown that the political processes

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[3] A copy of the Department of Justice's preclearance letter is attached as Appendix A.

leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."

To prevail on a Fourteenth Amendment claim of racial discrimination, a Plaintiff has the more difficult burden of showing intentional racial discrimination. *See, Rogers v. Herman Lodge*, 458 U.S. 613, 102 S.Ct. 3272, 2385 (1982). However, the same totality of factual circumstances considered in a Section 2 case may provide an evidentiary basis from which to infer the intent necessary in a Fourteenth Amendment violation. *Id.* at 623-27, 102 S.Ct. at 3279-81.

When the fact-finding process in a voting rights case is complete, a district court's factual conclusions must be reviewed under the "clearly erroneous" standard of Rule 52(a). An appellate court may not reweigh the facts, nor substitute its judgment for the judgment of the district court unless, based on the entire record, the court "is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 541 (1948).

This limitation on unrestrained factual review by an appellate court is the rule that controls this appeal. The three-judge court's determination that, for Fourteenth Amendment purposes, there had been no intentional discrimination, and that, for Section 2 purposes, minorities had not been blocked from participating in the electoral process are factual findings subject to the clearly erroneous rule. "Treating issues of intent as factual matters for the trier of fact is common place." *Pullman-Standard v. Swint*, 456 U.S. 273, 102 S.Ct. 1781, 1790 (1982). Similarly, the evidentiary showing of exclusion from the electoral process specifically required by subsection (b) of Section 2 is a factual matter to be reviewed under the clearly erroneous standard. It is essentially the same factual showing required by this Court in *White v. Regester*, where the Court twice deferred to the district court's factfinding, noting that there was no reason to disturb the findings and conclusions of

the lower court. 412 U.S. 755, 767, 769, 93 S.Ct. 2332. 2340, 2341 (1973). Nothing about the codification of this evidentiary burden as part of the amended Section 2 has transformed its inherently factual nature.[4]

Moreover, the three-judge court's findings of no racially discriminatory intent and equal access to participation in the electoral system are not subject to more detailed appellate review simply because they may be denominated findings of "ultimate fact." As *Pullman Standard, supra*, makes quite clear, Rule 52 "does not divide facts into categories; in particular, it does not divide findings of fact into those that deal with 'ultimate' and those that deal with 'subsidiary' facts." ____ U.S. at ____, 102 S.Ct. at 1789. In the absence of any allegation in Appellant's Jurisdictional Statement that the factual findings in this case are clearly erroneous, the three-judge court's factual conclusions must remain undisturbed, even if they are considered to be "ultimate" factual conclusions.

The deference compelled by Rule 52 to a trial court's factual findings is especially appropriate in voting rights cases. Because a trial court must make a decision based on a totality of the circumstances, the court must conduct "an intensely local appraisal of the design and impact ... (of the voting practice) in the light of past and present reality, political and otherwise." *White v. Regester, supra*, 412 U.S. at 770, 93 S.Ct. at 2341. In recognition of the factual detail involved in such an inquiry, this Court, has *repeatedly* refrained from upsetting the factual findings of lower courts in voting rights cases.

White v. Regester, is the best example of the level of review required by Rule 52 in a voting rights case. The three-judge court's conclusion there was based on the same factual question raised by a Section 2 claim: whether the "political processes

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[4]Under the holding in *Herman Lodge*, factual circumstances demonstrating unequal opportunity to participate in the electoral process are subsidiary facts that may support an ultimate factual conclusion of intentional discrimination in a Fourteenth Amendment claim. 458 U.S. at 624, 102 S.Ct. at 3279. Thus, any determination about the presence or absence of equal access is unquestionably factual in nature and subject to the clearly erroneous standard. *Id.* at 623, 102 at 3278 (clearly erroneous standard applies to trial court's subsidiary findings of fact).

leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political process and to elect legislators of their choice." 412 U.S. at 766, 93 S.Ct. at 2339. The trial court's factual finding that there had not been equal opportunity to participate was held sufficient to sustain the district court's judgment.

Regester's deference to factual findings followed the same practice established in *Wright v. Rockefeller,* 376 U.S. 52, 84 S.Ct. 603 (1964), which presented this Court with much the same type of request for factual review as presented by Appellant in this case. Plaintiffs-Appellants were minorities challenging a legislative decision to concentrate minority voters in three congressional districts rather than disperse them more evenly through an additional, fourth congressional district. This court accepted the three-judge panel's factual conclusion of no discrimination, recognizing the right of the fact finder "to choose among disputed inferences." 376 U.S. at 57, 84 S.Ct. at 605.

More recently, in *Rogers v. Herman Lodge,* this Court again limited the scope of its review of ultimate facts in a voting rights case. A district court had dismantled an at-large voting system and replaced it with a single-member district system. The Court of Appeals sustained the District Court's finding of intentional discrimination on the specific ground that it was not clearly erroneous. 454 U.S 626, 102 S.Ct. at 3275. This Court affirmed, declining to overturn factual findings not found to be clearly erroneous. *Id.* at 622-23, 102 S.Ct. at 3278-79, (citing *Pullman-Standard, supra*).

The three-judge panel in this case conducted the necessarily intensive factual review of history and local practice commanded by *Regester.* Among the factual circumstances considered were:

1. Election returns that indicated the continuing exercise by minorities of "swing vote" influence in *both* contested congressional districts. Jurisdictional Statement at A-1-15;

2. The existence of historical and natural boundaries. *Id.* at A-1-19, n.3; *Seamon v. Upham*, 536 F. Supp. 931, 956 (E.D. Tex. 1982);

3. Population figures, with special attention to the difference between voting age population statistics and general population statistics. Jurisdictional Statement at A-1-19, n.3; at *Seamon, supra*, 536 F.Supp. at 956, n.39;

4. Legislative concern for preserving incumbencies. Jurisdictional Statement at A-1-13;

5. Responsiveness of elected officials to minority needs. *Id.* at A-1-16; and

6. Polarized voting. *Id.* at A-1-19, n.4.

Additionally, the Court relied upon testimony from witnesses, including the testimony from Mr. Lee Jackson, the only witness presented by Appellant at trial. Mr. Jackson conceded that election returns established that minority voters can swing elections in both districts at issue. Jurisdictional Statement at A-1-15.

Based on subtantial evidence, the three-judge court concluded that neither Section 2 nor the Fourteenth Amendment had been violated. In the absence of any allegation that these factual conclusions were clearly erroneous or the result of an incorrect application of the law, Appellants are not now entitled to a reweighing and reevaluation by this Court of the same facts relied upon below.

2. The Appeal Does Not Present a Substantial Legal Issue.

Appellant has failed to present a substantial legal issue for determination by this Court. Appellant does not contend that the three-judge court misapplied a standard of law. *Cf., Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490 (1980). His appeal is based instead on his own *preference* for a congressional redistricting plan in which minorities are "packed" into one district, rather than left in two districts, in both of which the Court found

they played an active, *even decisive*, role in elections. Appellant attempts to evade the restrictions on factual review by treating the Texas Legislature's failure to maximize minority population in a single district at if it were a *per se* violation. It is not.

Attempts to create a single "safe" minority district may require dilution of minority voting strength in surrounding districts to the point that minorities remaining in the surrounding districts may be ignored with impunity by elected officials. *See, Taylor v. McKeithen*, 499 F.2d 893, 902 (5th Cir. 1974).[5] Consequently there is no agreement among courts, nor for that matter among minorities, on whether minority groups are best served by concentrating them in a single district they will dominate or by dispersing them through a number of districts where they will continue to exert their influence more broadly. *Id.* at A-1-12. Taken as a single factor, geographic distribution cannot by itself establish either the presence or absence of discriminatory intent or unequal access to the political electoral system. It must be considered in light of all the factual circumstances.

When so considered, the three-judge court found that "minority voters exert a significant impact in Districts 5 and 24, play pivotal roles in key elections, and are capable of selecting responsive, sensitive candidates of their choice." *Id*, at A-1-14 — A-1-15. In the absence of a finding that minorities have been "fenced out" of the electoral process, legislative preference for creating two minority "impact" districts rather than creating one arguably safe district at the expense of minorities remaining in the second district does not by itself present a substantial legal question.

Appellant's failure to bring forward any substantial claim of

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[5] As the Fifth Circuit noted in *United States v. Board of Supervisors of Forest County*, 571 F.2d 951, 956 (5th Cir. 1978), a racially gerrymandered plan "which would assure that blacks form a sizable electoral majority in a single district may not be nearly as effective a guarantee of access as the creation of two or more districts with substantial black voter populations such that all candidates in those districts must be responsive to the needs and aspirations of the black electorate." Appellant did not contest that creating a safe district in one of two districts would result in substantial dilution of minority strength in the remaining district. *See*, Jurisdictional Statement at A-1-12, n. 5.

legal errors leaves nothing but factual review for this Court. But, as noted, factual review must take place under the clearly erroneous rule and Appellant has not even claimed factual error. Thus, the First Question presents neither a substantial legal nor factual issue.

THE SECOND QUESTION

1. This Court Does Not Have Jurisdiction to Hear The Second Question.

By his Second Question, Appellant asks this Court to determine that the Texas Legislature intentionally violated the Fourteenth Amendment rights of Republican voters. This claim was never pleaded, never presented at an evidentiary hearing, and is not the subject of either a factual finding or a final judgment of the three-judgment court. As such, review by this Court is now precluded because of lack of jurisdiction.

A. This Court Does Not Have Jurisdiction Under 42 U.S.C. § 1973(c).

The first of two statutes upon which Appellant relies to demonstrate jurisdiction is 42 U.S.C. § 1973(c). This is the preclearance provision of the Voting Rights Act, which requires states and political subdivisions to submit voting changes to either the Attorney General or to a federal district court in Washington D.C. for review prior to implementation. Failure to obtain preclearance gives rise to a private cause of action for injunctive relief. *See, Allen v. State Board of Elections,* 393 U.S. 554, 555, 89 S.Ct. 817, 826 (1969). By express statutory provision, this case must be heard before a three-judge court and appeal is directly to the Supreme Court.

This jurisdictional basis is inapplicable to the Second Question presented by the Appellant.[6] The Second Question address the Fourteenth Amendment rights of Republican voters. Republicans are not among the minorities protected by the Voting Rights Act. 42 U.S.C. § 1973.

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[6]It is also inapplicable to First Question, which does not challenge my preclearance procedures.

B. This Court Does Not Have Jurisdiction Under 28 U.S.C. § 1253.

Appellant's alternative basis for jurisdiction is 28 U.S.C. § 1253. This is also an inadequate jurisdictional grant to support this Court's appellate review of the Second Question presented. The statute provides that any party may have direct appeal to this court from an order by a three-judge court "granting or denying ... an interlocutory or permanent injunction ..." No such order has ever been entered in this case regarding the Second Question presented. While the issue of Republican voting rights could have been presented, it was never the subject of any pleading, or any pretrial or post-trial amendment filed by Appellant. Appellant attempts to place this issue before the Court simply by including it in his Jurisdictional Statement. This cannot be done. Issues not raised below are not normally before this Court on appeal. *See, Adickes v. S.H. Kress Company,* 398 U.S. 144, 147 n.2, 90 S.Ct. 1598, 1613 (1970); *Dothard v. Rawlinson,* 433 U.S. 321, 323 n.1, 97 S.Ct. 2720, 2724 (1977).

2. This Court Should Not Review the Second Question as a Matter of Policy.

Even if this Court concludes that it has jurisdiction to review the Second Question presented, it should not. To do so would violate the longstanding policy of this Court that, in the absence of exceptional circumstances, questions not passed upon below are not to be reviewed for the first time on appeal.

The ordinary practice of this Court is not to decide questions not raised or resolved in the lower courts. *Youakim v. Miller,* 425 U.S. 231, 234, 96 S.Ct. 1399, 1401 (1976). In *Hormel v. Helvering,* 321 U.S. 552, 556, 61 S.Ct. 719, 721, 83 L.Ed. 1037 (1941), the Court explained that this is "essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues... [and] in order that litigants may not be surprised on the appeal by final decision there of issues upon which they have had not opportunity to introduce evidence." *See, also, Singleton v. Wulff,* 428 U.S. 106, 120, 96 S.Ct. 2868, 2877 (1976).

On occasion, however, this Court has recognized exceptions

to this policy when, for instance, proper resolution is beyond any doubt or injustice might otherwise result. *Singleton, supra,* 428 U.S. at 121, 96 S.Ct. at 2877. However, the exceptions have been narrowly applied to allow a reviewing court to consider unarticulated legal theories applied to the *undisputed* facts of a *single cause of action.* For example, in *Allen v. State Board of Elections,* 393 U.S. 544, 554, 89 S.Ct. 817, 825 (1969), Appellants prosecuted a voting rights case before the district court on a Fourteenth Amendment theory and waited until filing their Jurisdictional Statement with this Court to raise for the first time the applicability of Section 5 of the Voting Rights Act. Because all the facts were undisputed, this Court found it to be in the interest of judicial economy to consider the legal theory that had not been considered below. In *Youakim, supra,* the Court again considered a legal theory not presented below. But, the Court clearly noted that "the statutory issue is not foreign to the subject matter of the complaint ... (and) could surely have been pursued under the complaint filed in this case." 425 U.S. at 234, 96 S.Ct. at 1401.

In contrast to these cases, Appellant now seeks to present for the first time a matter factually quite distinct from the claims litigated at trial. Instead of merely presenting another legal theory in support of his rejected claim that the Texas congressional redistricting dilutes *minority* voting strength, Plaintiff now seeks to litigate the plan's impact on a totally different group: *Republicans.* Even under the broadly permissive reach of notice pleading, this is not a claim Appellant could have pursued under the complaint filed in this case, which makes no mention of Republicans. Appellees have never received fair notice of this claim and the grounds upon which it rests. *See, Conley v. Gibson,* 355 U.S. 41, 47, 78 S.Ct. 99,103 (1957). Nor has Appellant presented any evidence on this claim, let alone presented undisputed facts upon which this Court could act. To allow Appellant to present this issue for the first time on appeal to the Supreme Court would be to reward Appellant's sandbagging and leave Appellee without even the minimal protection offered by notice pleading.

Appellant's first mention of the issues presented in the Second Question came in his Motion for Rehearing or New Trial, which was denied by the two-judge majority. *See,* Jurisdictional

Statement at D-1. Such a decision is within the sound discretion of the trial court and should not be reversed absent a finding of abuse of discretion. *See, Martinez v. Food City, Inc.*, 658 F.2d 369 (5th Cir. Tex. 1981).

No such abuse existed in this case. The motion was based entirely on the dissenting opinion of Judge Steger. There is no representation that there is additional evidence to be presented, that an injustice occurred in the course of trial that should be remedied, that new case law has developed, that there was a misunderstanding of applicable principles of law, or that there existed any of the other reasons for which rehearings heretofore have been granted. Pursuant to Rule 59(a) of the Federal Rules of Civil Procedure.

Moreover, Appellant—who is Texas Republican Party Chairman—had every opportunity to pursue a claim on behalf of Republicans. Nevertheless, such a claim was never presented, nor was it the subject of any attempt to amend pursuant to the liberal amendment policies of Rule 15 of the Federal Rules of Civil Procedure, which, of course, allow pleadings to conform to issues actually tried by express or implied consent of the parties.

Far from establishing an abuse of discretion, the record amply demonstrates Appellant's lack of diligence, which should not now be rewarded by returning litigation that began in 1981 to its very preliminary stages.

CONCLUSION

Redistricting challenges call into question two fundamental concerns of this Court: the need for the electoral system to operate free from any and all aspersions about its integrity and the need to guarantee that all groups have equal access to the system. The intensive scrutiny focused on the Texas Legislature's congressional redistricting plan has met both these needs. To allow appellant to call the integrity of the electoral system back into question by simply asserting a preference for a particular redistricting plan without challenging either the accuracy of the factual findings or proper application of the law by the Court below is to thrust this Court unnecessarily into

the political thicket. Appellant has had his day in Court and is entitled to another only if he can demonstrate legal or factual error in the ruling below. The Jurisdictional Statement filed by Appellant fails to do this. Therefore, this Court should dismiss this appeal for lack of jurisdiction, and, in the alternative, affirm the decision of the Court below.

Respectfully submitted,

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Attorney General of Texas

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been sent via U.S. Mail, certified, return receipt requested on this the _____ day of _____, 1984, to all counsel of record as of this date.

DAVID R. RICHARDS

APPENDIX A

September 27, 1983

Honorable John W. Fainter, Jr.
Secretary of State of Texas
Elections Division
P.O. Box 12887
Austin, Texas 78711

Dear Mr. Secretary:

This is in reference to the reapportionment of congressional districts (Senate Bill No. 480 (1983)) in the State of Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Acts of 1965, as amended, 42 U.S.C. 1973c. We received your submission on July 29, 1983. Although we noted your request for expedited consideration, we have been unable to respond until this time.

S.B. 480 was passed following an objection by this office to certain limited aspects of the original plan, S.B.1. Following that objection an interim plan was adopted by the Court in *Upham, et al. v. Seamon*, 536 F.Supp. 931 (1982) which addressed not only the two districts specified as objectionable by this office (Nos. 15 and 27), but also modified the plan in Dallas County changing the configuration of Districts 5 and 24 so that each contained approximately 30% minority concentrations rather than 12.1 and 63.8 per cent respectively, as adopted by the legislature. On appeal the Supreme Court found that S.B.1 in the Dallas area "failed to meet the test of racial fairness for a court-ordered plan" but summarily reversed because the case presented no finding of a violation of the law or constitution that would permit the court to supplant the legislative judgments reflected in S.B.1. The Supreme Court did, however, permit the District Court to decide whether the election schedule was so far advanced as to require the 1982 elections to be *Seamon*, 456 U.S. 37 (1982). On remand the District Court concluded that the election should be conducted under its modified plan. See *Upham, supra*, 536 F. Supp. at 1030 (E.D. Tex.))1982). The legislature subsequently met and in most

respects adopted the court's interim plan as its own in S.B.480.

In measuring whether S.B.480 satisfies the requirements of the Voting Rights Act, we have carefully considered the above history and the Supreme Court's clear pronouncement in *Upham, supra* and elsewhere (see *White v. Weiser,* 412 U.S. 783 (1973); *Wise v. Lipscomb,* 437 U.S. 535 (1978)) that deference should be paid to legislative judgment absent "any finding of a constitutional or statutory violation" (*Upham, supra* at 40). The Texas legislature made such a judgment and one that was fully informed by the experience of conducting an election under the interim plan.

The question of whether minority voters are prejudiced by a plan in which they have a substantial proportion of the vote in two districts rather than a majority in one and minimal representation in the other is a complex one. It turns on an analysis of racial bloc voting, the extent minorities participate in political coalitions with majority race citizens and the purpose of the legislature in enacting the plan. In this case minority contacts are split about their view of the plan. Some argue that it affords them a "swing vote" in each district to elect favored candidates. Others argue that fairness demands one minority district with a clear majority.

Our analysis is that minorities in Dallas County have participated freely and sometimes decisively in congressional elections. They have participated in coalitions with others of similar persuasions. In fact, that appears to have occurred in last year's congressional election in Dallas. We have found no evidence that legislative judgment was infected by a racial or ethnic motive. Nor are we able to conclude that S.B.480, when compared — as the law requires (*Beer v. United States*, 425 U.S. 130 (1976)) — with the Congressional districts drawn in 1973, is in any meaningful respect retrogressive. Accordingly, the state has met the burden imposed by the Voting Rights Act with respect to the Dallas districts.

Similarly, the other aspects of the plan satisfy the Act. Overall minorities now have six districts in which they will be able to elect candidates of their choice compared to five under the interim plan and S.B.1. Our objection to the configuration

of Districts 15 and 27 has also been resolved by S.B.480.

Accordingly, the Attorney General does not interpose any objection to the plan here under submission. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of the change. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.48).

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

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NO. 83-1823

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GEORGE W. STRAKE, JR.,
Appellant,

v.

A. M. SEAMON, ET AL.,
Appellees.

On Appeal From The United States District Court For The Eastern District Of Texas

BRIEF OPPOSING APPELLEES' MOTION TO DISMISS OR AFFIRM

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George W. Strake, Jr., Appellant, will not argue with the Appellees' legal positions in their motion to dismiss or affirm even though Appellant believes them to be inapplicable to the present case. Appellant feels that his jurisdictional statement amply sets forth factual and legal bases which show that the trial court erroneously decided a case with grave and far-reaching effect. Appellant's case is worthy of this court's full and deliberate consideration.

On the other hand, Appellant is compelled to file this brief to correct an apparent factual misstatement in Appellees' motion to dismiss or affirm. On page 2 of their motion in footnote 2, Appellees state that in a 65% minority population district, a district that Appellant contends could and should have been created in Dallas County, minority voters would not constitute a voting majority.

The NAACP plaintiffs had a proposed 65% minority population district plan, but were directed by the trial court not to present it until the court had determined whether the plan before it, SB480, was invalid. Since the trial court upheld SB480, no 65% minority district plan was ever presented in court.

Perhaps Appellees are referring to proposed 65% minority districts that both Appellant and the NAACP plaintiffs submitted to the Justice Department in their letters opposing preclearance of SB480. However, none of these district plans contained any statistics, either in absolute numbers or percentages, on the amount of minority registered voters.

In Texas, there is no indication of race or ethnicity on voter registration records. An attempt has been made to approximate the hispanic registered voters in any area by a computer count of the registered voters in that area with hispanic surnames. Obviously, the same cannot be done for registered voters who are black. Appellant is not aware of any data that shows the number of registered voters who were minority in the 65% minority population district that the NAACP plaintiffs and Appellant felt should have been created. Census data for the 65% minority districts which the NAACP plaintiffs and Appel-

lant proposed to the Justice Department shows that minority individuals are approximately 59% of the voting age population of those districts.

Furthermore, regardless of the number of minority registered voters in the proposed 65% minority district at the present time, the actual existence of such a district would increase the number of minority individuals within that district who are registered to vote. This is the heart of Appellant's complaint about the absence of such a district. Without such a district, the access of minorities to the political processes is inhibited and consequently their involvement through registration and voting is depressed.

CONCLUSION

In conclusion, having commented on the apparent misstatement in Appellee's motion to dismiss or affirm, Appellant respectfully reiterates its request to note probable jurisdiction of this case.

Respectfully submitted,

PAYNE & VENDIG

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512/474-7621

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been sent via U.S. Mail, certified return receipt requested on this the ____ day of September, 1984, to all counsel of record as of this date.

DAVID HERNDON